PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 78
Issue 2 *Dickinson Law Review - Volume 78, 1973-1974*

1-1-1974

Private Enforcement of Antitrust Laws: Damages Recoverable for an Illegal Tying Arrangement

Gregory J. Blasi

Comments

PRIVATE ENFORCEMENT OF ANTITRUST LAWS: DAMAGES RECOVERABLE FOR AN ILLEGAL TYING ARRANGEMENT

INTRODUCTION

With the continued expansion of our nation's economy during the past several decades, business entrepeneurs have employed a variety of practices to increase their share of the market at a minimum of expense. One of the most prevalent devices, especially in the area of franchising,[1] has been the use of the so-called tying arrangement. Until recently, any violation of the Sherman Act[2] or the Clayton Act[3] which these practices might have occasioned were prosecuted primarily by the government. However, with a developing sophistication of the trial bar a greater number of private enforcement suits have been initiated to help discipline our burgeoning business community.

Although there has been an abundance of private antitrust litigation in recent years, suprisingly little of it has concentrated on

1. Although a tying arrangement is not unique to franchising, this method of business organization is particularly conducive to the establishment of a tie-in. Therefore, a basic understanding of the functioning of a franchise agreement is desirable.

Initially it is important to note that franchising is not a separate industry. Rather it is a method of business organization applicable to a great number of industries, by which the franchisor can expand his method of distribution vertically, while avoiding the often prohibitive capital outlays required for more traditional expansion techniques.

An excellent description of the general outlines of a franchise agreement is contained in J. McCord, *The Franchising Sourcebook* 4-5 (Commercial Law and Practice Sourcebook Series No. 2, 1970).

2. 15 U.S.C. §§ 1-7 (1970).

3. 15 U.S.C. §§ 12-27 (1970).

the problem of tie-ins or, more importantly, what damages are recoverable once the illegal arrangement has been established. In an effort to put this area into focus, this Comment will examine several aspects of private enforcement of the federal prohibitions against tie-ins. Initially, the article will explore what constitutes a tie-in and what factors make certain tie-in's violative of the antitrust laws. Thereafter, the author will discuss the issue of standing to maintain suit under Section 4 of the Clayton Act.[4] Finally, the major portion of the comment will examine in detail what damages, if any, may be recovered once the illegal tying arrangement has been demonstrated.

ELEMENTS INVOLVED IN TIE-IN LITIGATION

A. *Definition of a Tying Arrangement*

The Supreme Court has defined a tie-in as:

> An agreement by a party to sell one product (the tying product) but only on the condition that the buyer also purchase a different or tied product or at least agrees that he will not purchase that product from any other supplier.[5]

However, a tying arrangement may be shown to exist even where it is not imposed by means of an express agreement. For example, a gasoline dealer may contract to buy 4,000 gallons of gasoline every month from his supplier. But, in addition, it is understood by both parties that the dealer must also purchase fifteen sets of tires from this same supplier every month if he is continue to receive his supply of gasoline. The presence of the tie-in may be demonstrated by this extrinsic course of conduct supplementing the written contract.[6]

Congress has frowned on such practice because competition is stifled in several ways. First, the purchaser is compelled to buy the tied product not because the supplier is offering him better terms but merely because the supplier has enough economic power in the tying product market to demand such compliance.[7] In ad-

4. 15 U.S.C. § 15 (1970).

5. Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6 (1958). The facts of this case indicate that in 1864 and 1870 Congress granted the predecessor of the Northern Pacific Railway Co. approximately forty million acres of land in several Northwestern States and Territories to facilitate its construction of a railroad line from Lake Superior to Puget Sound. By 1949 the Railroad had sold about 37,000,000 acres of its holdings but had reserved mineral rights in 6,500,000 of those acres. In a large number of its sales contracts and most of its lease agreements the plaintiff had inserted preferential routing clauses which compelled the grantee or lessee to ship over its lines all commodities produced or manufactured on the land provided that its rates were equal to those of competing carriers. There were other means of transportation, including two additional rail lines, by which these goods could have been shipped.

6. Osborn v. Sinclair Refining Co., 286 F.2d 832, 837 (4th Cir. 1960).

7. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606 (1953).

dition, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement.[8] Moreover, the courts have found that the existence of a tie-in can rarely be justified because, "they serve hardly any purpose beyond the suppression of competition."[9] As a result, tie-ins have been held illegal under both Section 3 of the Clayton Act[10] and Section 1 of the Sherman Act.[11] The Clayton Act concerns itself with tie-ins involving commodities.[12] Services and other types of property subject to tying arrangements are dealt with in the Sherman Act.

B. *Proving an Illegal Tie-In*

The initial problem presented in every attempt to prove an illegal tie-in is: does the arrangement actually involve two distinct products and require that one, the tying product, may not be purchased unless the tied product is also bought.[13] Since almost all goods are made up of component parts this test is often quite difficult to apply. It is obvious, for example, that selling an automobile and the accompanying windshield as one product does not involve a tie-in. While it is true that each product may be sold separately, selling both together as a unit does not involve the coercion and market foreclosure that the prohibition against tie-ins is designed to eliminate.

---

8. International Salt Co. v. United States, 332 U.S. 392 (1947).

9. Standard Oil and Standard Stations v. United States, 337 U.S. 293, 305-06 (1949).

10. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), provides:

> It shall be unlawful for any person engaged in commerce, . . . to lease or make a sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

11. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), states, "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." However, this section of the statute has been interpreted so as to proscribe only those restraints which are considered *unreasonable*. Standard Oil v. United States, 221 U.S. 1 (1911).

12. Commodity as used here means: "any movable or tangible thing that is produced or used as the subject of barter or sale." People v. Epstean, 102 Misc. 476, 170 N.Y.S. 68, 79 (Ct. of Gen. Sessions 1918).

13. Mr. Justice Clark stated in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14 (1952), "The common core of the unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant tying product resulting in economic harm to competition in the tied market."

On the other hand, the test becomes much more difficult to apply when the two products involved are the car and the factory installed radio. An initial reaction to this combination might be that there is obviously no tying arrangement involved here either. Yet, upon closer examination, it appears that all the definitional factors are present. If buyers want a radio (which is always listed as an option) in their new car they must take the one offered to them by the manufacturer. In addition, a substantial share of the market is closed to those independent suppliers who specialize in producing and marketing car electronics including radios.[14]

The point to be made is that the decision as to whether a tie-in exists should not rest solely on a determination of whether two separate products are involved. Rather, in making a determination, the courts take into account those aspects of tying arrangements which prompted Congress to declare them illegal. If it appears that a particular combination of goods might indeed substantially lessen competition and there is some evidence that separate products are involved (for example that several other companies produce and market the tied product) the court should allow the action to proceed. If the tie-in does not fall within the rule of per se illegality, the plaintiff must still prove that the general standards of the antitrust laws have been violated and the defendant always has an opportunity to justify this combination of goods.[15]

C. *The Doctrine of Per Se Illegality*

Once the plaintiff proves that a tying arrangement does exist he may be able to avail himself of the doctrine of per se illegality. The basis for the doctrine was stated by Mr. Justice Black in *Northern Pacific Railroad v. United States:*

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[16]

Originally, different standards were applicable to invoke this presumption of illegality depending upon which antitrust law the action was based. According to the decision in *Times-Picayune v. United States*[17] the presumption would arise under the Clayton

14. Although it is doubtful that courts would condemn this as an illegal tying arrangement for reasons listed above, the difficulty in determining what are separate products is by no means imaginary. Recently the Ninth Circuit held that a trademark was a distinct tying item where the franchisees were required to purchase all equipment associated with the business from the franchisor. Siegal v. Chicken Delight Inc., 448 F.2d 43, 47-49 (9th Cir. 1971).

15. *See* note 33 and accompanying text *infra*.

16. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

17. 345 U.S. 594, 608-09 (1953).

Act[18] if the seller enjoyed a monopolistic position in the tying product market *or* if a substantial amount of competition was suppressed in the market of the tied product. In order for this doctrine to come into play under a Sherman Act[19] violation, the court held that *both* of the above conditions had to be met.[20]

However, in a later case,[21] the Supreme Court in dealing with a Sherman Act violation stated that tie-ins were presumed illegal when (1) the seller enjoys sufficient economic power with respect to the tying product to appreciably restrain trade in the tied product market and (2) a not insubstantial amount of competition is affected. The important difference between this test and the first one enunciated[22] is that the requirement of a "monopolistic position" has been dropped. Since, realistically, a tie-in cannot be imposed unless the seller enjoys some leverage in the tying product market and, in addition, the arrangement will not be considered illegal unless a fair amount of interstate competition is affected, it appears as if the test for per se illegality under both statutes has become identical.

The Supreme Court has been quite liberal in determining what elements will satisfy the first half of this test. Although it is impossible to state with precision what constitutes sufficient economic power over the tying product to render the tie-in illegal, it is clear that economic dominance is not a prerequisite.[23] In its most recent statement on the subject[24] the Court seemed to indicate that if a plaintiff merely showed a tie-in was successfully imposed on an "appreciable number of buyers"[25] within the market, this would demonstrate sufficient economic power notwithstanding the fact that the seller may only have leverage in a relatively small share of the tying product market.[26]

18. 15 U.S.C. § 14 (1970).
19. 15 U.S.C. § 1 (1970).
20. Times-Picayune v. United States, 345 U.S. 594, 608-09 (1953).
21. Northern Pacific Ry. v. United States, 356 U.S. 1, 11 (1958).
22. *See* note 17 and accompanying text *supra*.
23. In United States v. Loews Inc., 371 U.S. 38, 45 (1962), the court stated, "even absent a showing of market dominance, the crucial economic power may be inferred from the tying products desirability to consumers or from uniqueness in its attributes."
24. Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 497 (1969).
25. *Id.* at 504.
26. This same rationale applies to patented or copyrighted *tying* products. By its very nature a patent or a copyright gives the owner a lawful monopoly over the goods in question and any attempt to extend this monopoly to other goods via a tying arrangement is considered to be per se illegal. United States v. Loews Inc., 371 U.S. 38, 45 (1962).

The second half of the test was announced in *International Salt Co. v. United States*[27] where $500,000 of interstate commerce was affected by the tying arrangement. Since then, in an effort to stimulate private antitrust suits, the Court has stated:

> For the purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, . . . the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of the total accounted for by the particular plaintiff who brings suit.[28]

As long as this figure is not "de minimis"[29] the courts will consider the tie-in to affect a substantial amount of interstate commerce.

It is important to remember that the plaintiff does not have to meet the above standards in order to prevail on the merits of the case. These requirements are only necessary to bring into play the doctrine of per se illegality. Once it has been determined that the doctrine was properly invoked[30] the arrangement is presumed to be illegal without making an elaborate inquiry into the exact nature of the anti-competitive practice and the plaintiff may proceed directly to the question of damages. However, even if the plaintiff fails to satsify these standards it is not fatal to his case. He may still prevail on the merits when he can prove, "on the basis of a more thorough examination of the purposes and effects of practices involved . . . ,"[31] that the general standard of the antitrust laws have been violated.

Even if the tie-in is presumed to be illegal, the supplier still has an opportunity to defend on the ground that the arrangement serves a legitimate business purpose.[32] The courts, however, have not been receptive to such justifications and there are only a handful of decisions which recognize this as a valid defense.[33]

---

27. 332 U.S. 392 (1947).

28. Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 497, 502 (1969).

29. *Id.* at 501. The amount of interstate commerce affected in this case was worth $200,000.

30. The plaintiff must prove that the alleged violation is per se illegal by a preponderance of the evidence. Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972).

31. Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 497, 500 (1969).

32. *Id.* at 506.

33. The following reasons have been accepted by the courts as justifying a tying arrangement. *New Business*: White Motor Co. v. United States, 372 U.S. 253 (1963); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). *Difficulty in detailing specifications for substitutes*: Susser v. Carvel Corp., 332 F.2d 505, 512 (2d Cir. 1964), stating:

> Yet it seems clear that in compelling circumstances the protection of good will, as embodied for example in a valuable trademark may justify an otherwise invalid tying arrangement. But, '. . . the only situation indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a

There is, in addition, one other aid available to a plaintiff to ease his burden in proving the existence of an antitrust violation. Section 5 of the Clayton Act[34] makes a final judgment or decree in any civil or criminal suit brought by the federal government "prima facie" evidence of the illegality of the arrangement in a private enforcement suit dealing with the same matters.[35] The policy behind the statute is, "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the government in antitrust actions."[36]

The only exception to the rule is the proviso which states that the section does not apply if the judgment rendered in the federal action was a consent judgment.[37] However, at least four courts[38] have determined that the only time this proviso is operative is when the plea in the federal action was nolo contendere. All other pleas whether acquiesced in or not render the violator prima facie liable in a private action dealing with the same issues.[39]

D. *Standing to Sue*[40]

Private antitrust suits are not founded merely on the showing

---

substitute (the tied product) would be so detailed that they could not practicably be supplied. Standard Oil Co. and Standard Stations v. United States, 337 U.S. 293, 306 (1949).'

Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 64 Misc. 2d 894, 315 N.Y.S.2d 897 (N.Y. Supreme Ct. 1970). *Preservation of Good Will*: Standard Oil Co. and Standard Stations v. United States, 337 U.S. 293 (1949); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

Once the plaintiff has succeeded in proving that an illegal tying arrangement exists, the defendant has the burden of proving that there is a legitimate business reason for the tie-in. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 548 (E.D. Pa. 1960).

34. 15 U.S.C. § 16a (1970), states:

A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws. . . . *Provided*, that this section shall not apply to consent judgments. . . .

35. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 484 (1968).

36. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

37. *See* note 34 *supra*.

38. Armco Steel Corp. v. North Dakota, 376 F.2d 206, 209 (8th Cir. 1967), and authorities cited therein.

39. *Id.* at 209-10.

40. For a comprehensive analysis of the standing to sue problem *see* Comment, *Standing Under Clayton Section 4: A Proverbial Mystery*, 77 DICK L. REV. 73 (1972).

of an antitrust violation.[41] In order to successfully prosecute private antitrust litigation the plaintiff must allege that he has suffered some injury[42] as a result of the violation. While Section 4 of the Clayton Act[43] states that "any person" so injured may recover treble damages, the courts have been reluctant to interpret the section literally. Instead, feeling that such interpretation would unloose a new flood of cases which the judiciary would be unable to handle, the courts have developed some rather strict and complicated requirements which the plaintiff must meet before he is considered to have standing under Section 4.[44]

The first requirement that the plaintiff must meet is the necessary causal connection[45] between the antitrust violation and the injury suffered. Two tests have been developed to determine whether the necessary causal connection exists. The first indicates that if the plaintiff is the person against whom the conspiracy was directed or if the plaintiff has a direct business connection with the antitrust violator and he can establish a link between violation and injury, the casual connection will have been demonstrated and plaintiff will be granted standing to sue.[46] The second test developed by other jurisdictions, is somewhat broader in its scope. If the plaintiff can establish he was within the business category against which the conspiracy was directed and again can prove the

---

41. "In a private antitrust action liability and damages are not separate. . . . One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage." Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 802 (1st Cir.), *cert. denied,* 379 U.S. 931 (1964).

42. Injury has been defined as follows: "[a]n act or occurrence which impairs the economic position of the plaintiff." Muskin Shoe Co. v. United Shoe Machinery Corp., 167 F. Supp. 106, 111 (D. Md. 1958).

43. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit including a reasonable attorney's fee.

44. 15 U.S.C. § 15 (1970).

45. Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). Comment, *Standing Under Clayton Section 4: A Proverbial Mystery,* 77 DICK. L. REV. 73, 74 (1972).

46. SCM v. Radio Corp. of America, 407 F.2d 166 (2d Cir. 1969), *cert. denied,* 395 U.S. 943 (1969). Comment, *Standing Under Clayton Section 4: A Proverbial Mystery,* 77 DICK. L. REV. 73, 76 (1972). This test is called the direct injury rule and it is supported by the Second, Third, Sixth and Tenth Circuit Courts of Appeals. *E.g.,* Harrison v. Paramount Pictures, 115 F. Supp. 312, 316 (E.D. Pa. 1953), *aff'd,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954); Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir.), *cert. denied,* 372 U.S. 907 (1962); Nationwide Auto Appraiser Serv. v. Ass'n of C. & S. Co., 382 F.2d 925, 928 (10th Cir. 1967). *But cf.,* H.F.S. Co. v. American Standard, Inc., 336 F. Supp. 110, 115-16 (D. Kan. 1972) (accepting both the target area and the directness test); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 702 (D. Colo. 1970) (indicating both tests are incorrect).

connection between violation and injury he will be granted standing to sue.[47]

However, these tests constitute only one element of the standing requirement. The second, the fact of injury,[48] is the bridge between the standing requirement and the amount of damages recoverable. Because, private antitrust suits do not rest merely on a factual determination that a violation has occurred[49] the plaintiff must prove, by a fair preponderance of the evidence,[50] that he has actually been injured. This element does not determine what damages are recoverable once the injury has been proven. It only establishes that there is a compensable injury. The difference between these two concepts and the measure of proof necessary for each was clearly stated by Mr. Justice Sutherland in *Story Parchment Company v. Paterson Parchment Paper Company*:[51]

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those which are definitely attributable to the wrong and only uncertain in respect of their amount.

It is clear, therefore, that unless the plaintiff can demonstrate some actual injury he will be denied standing to sue under Section 4.[52] However, once the plaintiff establishes the fact of injury he need not specify the exact amount in which he has been damaged.[53] Since there is a strong policy favoring the implementation

47. Karseal v. Richfield Oil Corp., 271 F.2d 709 (9th Cir. 1959). Comment, *Standing Under Clayton Section 4: A Proverbial Mystery*, 77 DICK. L. REV. 73, 80 (1972). This is called the target area test and is supported by the Fourth, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals. *See, e.g.*, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 419 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967); Congress Building Corp. v. Loew's Inc., 246 F.2d 587, 592 (7th Cir. 1957); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 689 (8th Cir. 1966).

48. Comment, *Standing Under Clayton Section 4: A Proverbial Mystery*, 77 DICK. L. REV. 73, 89 (1972).

49. *See* note 41 and accompanying text *supra*.

50. Clark Marine Corp. v. Cargill, Inc., 226 F. Supp. 103 (E.D. La. 1964), *aff'd*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 392 U.S. 1011 (1966).

51. 282 U.S. 555, 562 (1930).

52. 15 U.S.C. § 15 (1970).

53. Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 578-79 (10th Cir. 1961).

of private treble damage suits,[54] once the plaintiff has proved the fact of injury the amount of his damage need only be proved with reasonable certainty.[55]

Thus, before the issue of damages ever comes to the fore in private antitrust litigation the plaintiff must plead and prove the existence of a violation,[56] the causal connection between the violation and the injury[57] and the fact that some injury has been sustained.[58] Only at this juncture may the plaintiff begin to litigate the question of the amount of his recovery.

DAMAGES[59]

Once having successfully satisfied the criteria for initiating a suit the litigant may now proceed to prove what damages he has suffered as a result of the illegal tying arrangement. There are those who are injured because they are unwillingly involved in the tie-in.[60] There are others who are damaged because they are excluded from selling goods in the market which the tying arrangement encompasses.[61] Accordingly the remainder of the article will examine the damages recoverable by each of these groups.

A. *Plaintiffs Involved in a Tying Arrangement: Overcharge as Measure of Damage*

Traditionally, a party suing to recover treble damages[62] has been permitted to recover for: (1) loss of profits that could have been earned in a freely competitive market;[63] (2) increased cost of doing business[64] and (3) the decrease in value of investment in tan-

---

54. United States v. Borden Co., 347 U.S. 514 (1964). Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59, 71 (S.D.N.Y. 1964), *aff'd*, 337 F.2d 844 (2d Cir. 1964), where the court stated:

> The most significant consideration is the strong policy in favor of private treble damage actions, which are intended not only to compensate those injured by violations of the antitrust laws, but also to function as an independent method of enforcing antitrust policy.

55. Kidd v. Standard Oil Co., 295 F.2d 497, 498-99 (6th Cir. 1961); Sterling Nelson & Sons, Inc. v. Rangen Inc., 235 F. Supp. 393 (D. Idaho 1964), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

56. Glenn Coal v. Dickinson Fuel Co., 72 F.2d 885 (6th Cir. 1934).

57. *See* note 45 and accompanying text *supra*.

58. *See* note 50 and accompanying text *supra*.

59. It should be noted that a plaintiff may recover damages for all injuries caused by the antitrust violations *prior* to the filing of the action and conversely a plaintiff is not entitled to recover damages for injury resulting from wrongful acts committed *subsequent* to the filing of the action. Flinkote Co. v. Lysfjord, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957).

60. *See* notes 62-98 and accompanying text *infra*.

61. *See* notes 144-165 and accompanying text *infra*.

62. 15 U.S.C. § 15 (1970).

63. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (Sherman Act violation); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) (Sherman Act violation); Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927) (Clayton Act violation).

64. Thomsen v. Cayser, 243 U.S. 66 (1917) (Sherman Act violation); Chattanooga Foundary & Pipe Works v. Atlanta, 203 U.S. 390 (1906) (Sher-

gible or intangible property.[65] No two categories are mutually exclusive and a plaintiff may recover all three types of damage provided sufficient evidence is introduced to support the allegations.[66] However, this traditional rule has not been adhered to when a Section 3[67] violation has been involved. In the name of refusing to award speculative damages,[68] the judiciary has for the most part limited recovery by a plaintiff who is involved in a tie-in to the difference between what he paid for the tied product and what the product was actually selling for on the open market.[69]

The first statement of this measure of recovery came in *Chattanooga Foundry and Pipe Works v. Atlanta.*[70] As a result of an illegal combination of pipe manufacturers the City of Atlanta was forced to buy pipe for its system of waterworks at a price above what was reasonable or what the pipe was worth. Mr. Justice Holmes speaking for the majority stated that because the city was forced to pay more than it should have it was injured in its property as required by Section 7 of the Sherman Act.[71] As a result the proper measure of damage was the difference in price trebled between what the city paid for the pipe and, "the market or fair price that the city would have had to pay under natural conditions had the illegal combination not been in existence."[72]

---

man Act violation); Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert denied*, 355 U.S. 835 (1957) (Sherman and Clayton Act violations); Straus v. Victor Talking Machine Co., 297 F. 791 (2d Cir. 1924) (Sherman Act violation); Muskin Shoe Co. v. United Shoe Machinery Corp., 167 F. Supp. 106 (D. Md. 1958) (Sherman Act violation); United States Tobacco Co. v. American Tobacco Co., 163 F. 701 (S.D.N.Y. 1908) (Sherman Act violation).

65. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) (Sherman Act violation).

66. Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59 (S.D.N.Y. 1964); State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 202 F. Supp. 768 (N.D. Ill. 1961).

67. 15 U.S.C. § 14 (1970).

68. Courts have been practically unanimous in indicating that proving damages in antitrust cases is rarely susceptible to the kind of concrete and detailed proof that is available in other contexts. Therefore a traditional statement of the speculative damage rule is, "although the fact finder is not entitled to base a judgment on speculation or guesswork, 'the jury may make a just and reasonable estimate of the damage based on the relevant data and render its verdict accordingly.'" Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 124 (1969). This rule is vague enough so that the courts can generally expand or contract its application as they see fit.

69. *See* notes 79-81 and accompanying text *infra.*

70. 203 U.S. 391 (1906).

71. This injury to property has now been incorporated in Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

72. 203 U.S. 391, 396 (1906). *See* Southern Pacific Co. v. Darnell-Taenzer Co., 265 U.S. 531, 533-34 (1918).

This measure of recovery was picked up almost immediately by the lower courts[73] and found its first application in a sale of goods context in *Straus v. Victor Talking Machine Co.*[74] Prior to August 1913 the plaintiff was allowed to purchase record players from Victor's distributors at 10% to 40% off the list price. After August the defendant instituted a rather complicated licensing agreement[75] which stated that any distributor who "assigned" the machines for any price other than the one designated by Victor would lose his distributorship. The effect of this was to force Straus to pay full retail price for any machine that it planned to re-sell in its own store.

In upholding the plaintiff's claim of antitrust violation the court indicated that the plaintiff was damaged because he was unable to exercise his rights to purchase goods in a free market.[76] As a result the court indicated that Straus did not have to sue for lost profits and risk no recovery at all,[77] but instead, could recover the difference between "the established reasonable price and the amounts plaintiffs were compelled to pay . . . . "[78] There was no indication by the court in this context that these damages were mutually exclusive.

However, in dealing with tie-ins litigation the judiciary has almost uniformly indicated that the only allowable measure of recovery is the amount of the overcharge.[79] Although overcharge has been the basic measure of recovery, the amount of the overcharge falls into two categories: (1) the difference between the price paid for the tied product and the price at which comparable products were available;[80] (2) where no payment has been exacted

---

73. United States Tobacco Co. v. American Tobacco Co., 163 F. 701 (S.D.N.Y. 1908).

74. 397 F. 791 (2d Cir. 1924). An attempt might be made to distinguish this case on the ground that the actual damage the court is allowing is the cost of obtaining goods elsewhere because of the refusal to deal. This is actually no more than overcharge with a different name.

75. The court described this licensing agreement as follows:

> It was provided in this 'license agreement' that licensed dealers were by its terms permitted to use the Victor instrument only for demonstrating purposes and were empowered to assign the right to the public 'upon payment of the full list royalty or license fee' as fixed by Victor Company from time to time, and it was also provided that no 'license' should be assigned by distributors 'to a dealer at less than the dealer's license royalty, or by any dealer to a user or any other party at less than the full list royalty,' and the distributors could only license to a dealer approved by Victor Company.

Id. at 794. By this system the defendant attempted to retain title to all patented machines and records thereafter shipped to distributors and to license the use of them for the term of its patent having the longest time to run.

76. 297 F. 791, 802-03 (2d Cir. 1924).

77. *Id.* at 803.

78. *Id.*

79. *See* notes 63-69 and accompanying text *supra.*

80. *See* note 83 and accompanying text *infra.* There is another variation of this traditional method which measures the amount of the over-

for the tying product, the excess over the fair market value of both the tying and tied product.[81] The following discussion will demonstrate how each variation has been used.

The traditional measure of overcharge as expressed by Mr. Justice Holmes[82] was applied most recently in *Gray v. Shell Oil Company.*[83] Plaintiffs were operators of service stations leased from defendant oil company. The court found the evidence sufficient to show that the defendant imposed upon its dealers a system of tying arrangements applicable to petroleum products and tires, batteries and automotive accessories (TBA) which Shell sold or sponsored. The plaintiffs claimed that Shell received a commission from these companies on all sales made to plaintiff operators. They contended that the amount of these commissions trebled (which, although not mentioned, it would be safe to assume would have been greater than treble the amount of the overcharge) should be the damages recoverable.[84] Although the court declared the plaintiffs had failed to prove any injury stemming from the alleged antitrust violation under Section 3 of the Clayton Act[85] it also stated, "[u]nder ordinary circumstances, the appellants injury and damage, if any, would be the difference between the price they paid for the TBA merchandise and what they might have been compelled to pay for comparable goods."[86]

A similar result was reached in the Second Circuit in 1953.[87] Plaintiff (franchisee) alleged that as a necessary prerequisite to

---

charge as the difference between the price paid for the tied product and the price at which *this* product would have been bought if sold free of the tying arrangement. The primary difference between these two methods in determining the amount of the overcharge is evidentiary. Under the first method, the plaintiff will introduce evidence to indicate what products similar to the tied product are selling for on the open market. (In Gray v. Shell Oil Company, 469 F.2d 742, 751 (9th Cir. 1972) where the court concluded that, since the plaintiffs had introduced no evidence showing what comparable products were selling for, they had failed to produce evidence of injury or damage sufficient to go to the jury on this issue). Under method two, the plaintiff's evidence will demonstrate what the tied product itself would sell for if it was available free of the tying arrangement. *Cf.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968).

81. *See* note 91 and accompanying text *infra.*
82. *See* note 70 and accompanying text *supra.*
83. 469 F.2d 742 (9th Cir. 1972). Appeal to Supreme Court pending.
84. *Id.* at 751.
85. 15 U.S.C. § 14 (1970).
86. Gray v. Shell Oil Company, 469 F.2d 742, 751 (9th Cir. 1972). This result is somewhat surprising since the Ninth Circuit is one of the two circuits that has allowed something other than mere overcharge in tie-in cases. *See* notes 99 and 115 and accompanying text *infra.*
87. Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir. 1953).

obtaining defendant's (franchisor) washing machines for its coin operated laundries it had to agree to purchase additional equipment such as meters and clocks from the franchisor as well. Although the court found that neither the Sherman[88] nor Clayton[89] Acts had been violated it stated that had such violation been proved the actual damages flowing from that violation might well include the additional amount which the franchisees were required to pay as a result of the tying arrangement.[90]

To date there has been only one case, *Siegal v. Chicken Delight, Inc.*[91] in which the second measure of determining overcharge[92] has been applied. The plaintiffs stated in their complaint that as a condition to their obtaining a license to operate a Chicken Delight Franchise and use its registered trademark they were required to buy from the franchisor cookers, fryers and certain mix preparations. This practice was alleged to be an illegal tying arrangement in violation of the Sherman Act.[93] As a result of this arrangement the plaintiffs declared they were damaged in the amount of the difference between what they had to pay for the tied products and the price at which those products could have been purchased in the open market.

The defendants contended that even if an illegal tie-in was found to exist the simple overcharge theory of damages should not be applied in this case. Chicken Delight argued that since the franchisees were not required to pay any franchise fees or royalty payments the overcharge should be offset by a "reasonable value"[94] assessed for the Chicken Delight license.

The district court determined that an illegal tie-in did exist and it rejected the defendant's contention that the amount of the overcharge should be offset by the reasonable value of the license. It stated:

> This Court will not attempt to restructure the system of defendants into one which is legally constituted and then allow an offset for imaginary or suppositious royalty fees.

---

88. 15 U.S.C. §§ 1-7 (1970).

89. 15 U.S.C. §§ 12-27 (1970).

90. Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331, 334 (2d Cir. 1953). *Accord,* Osborn v. Sinclair Refining Corp., 324 F.2d 566 (4th Cir. 1963). Lessig v. Tidewater Oil Co., 327 F.2d 459, 471-72 (9th Cir. 1964), where it is stated, "the evidence showed how much more some items of sponsored TBA cost than competitive brands and the quantity of the former Lessig purchased. . . . This was relevant data from which the jury could have made a just and reasonable estimate of damage."

91. 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part,* and *rev'd* and *remanded* for limited new trial, 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

92. *See* note 81 and accompanying text *supra.*

93. 15 U.S.C. § 1 (1970).

94. Siegel v. Chicken Delight, Inc., 311 F. Supp. 847, 852 (N.D. Cal. 1970).

> Such would be directly contrary to the avowed policy of the Sherman Act.[95]

On appeal, the circuit court upheld the district court's finding of an illegal tie-in but reversed and remanded for a new computation of damages.[96] In affirming the defendant's contention that the overcharge should be offset by the reasonable value of the license the court declared:

> It is by no means clear that any of the parties to the tying arrangement understood that the tying items were to be given free of charge. Indeed, the more reasonable reading of the contracts and of Chicken Delight's representations is that they stated simply that the contract price for the tied items were to be the full compensation asked by Chicken Delight for both those items and the franchise licenses.
>
> By its own terms, Clayton Act recovery is only available where actual injury has been suffered.[97] (citation omitted). The question here is whether the plaintiffs have suffered injury by virtue of the unlawful arrangement to which they were subjected. That arrangement of necessity involved both the tying and tied products. To ascertain whether an unlawful arrangement for the sale of products has caused the injury the cost or value of the products involved free from the unlawful arrangement must be ascertained.[98]

Thus, upon retrial, only if the jury found that the amount of the overcharge was greater than the reasonable value of the franchise license would the plaintiffs be allowed to recover.

B. *Damages Other Than Overcharge: Recovery of Anticipated Profits*

The first break in this strict application of the overcharge theory in tie-in litigation came in 1963 in the case of *Osborn v. Sinclair Refining Corporation.*[99] The plaintiff, an operator of a Sinclair station, declared in his complaint that his lease was cancelled by the defendant as a result of his reluctance to purchase products from companies that Sinclair recommended. The plaintiff claimed as damages the difference in overcharge for the tied product *and* the loss of one year's anticipated profits as a result of the

95. *Id.* at 852.
96. 448 F.2d 43 (9th Cir. 1971).
97. *See* notes 40-58 and accompanying text *supra.*
98. Siegel v. Chicken Delight, Inc., 448 F.2d 43, 52 (9th Cir. 1971).
99. 207 F. Supp. 856 (D. Md. 1962), *rev'd,* 324 F.2d 566 (4th Cir. 1963).

refusal to deal.[100] The district court concluded[101] that the plaintiff would be allowed to recover damages stemming from the overcharge but would be denied loss of anticipated profits.[102]

The court based its disallowance of the second measure of recovery on the single trader rule first enunciated in *United States v. Colgate.*[103] It declared that since the refusal to deal was not done in concert with others as part of a conspiracy,[104] or in furtherance of a monopoly,[105] and was not per se unreasonable, there could be no recovery for the termination of this business relationship.

The circuit court of appeals[106] reversed and flatly stated that the lower court had misapplied the single trader rule.[107] The appeals court declared that under Section 4 of the Clayton Act[108] once it is established that an unreasonable restraint of trade exists, the question is no longer one of reasonableness or monoply but merely one of causation: "It is as the statute plainly says, simply whether the injury was caused by something made unlawful by the antitrust laws."[109]

The court expanded on the concept of injury set forth in the Clayton Act[110] and indicated that, "[i]n many, if not most, private antitrust actions the principal element of damage is precisely what we are now considering—the loss of profits caused by a refusal to deal."[111] Therefore, the conclusion reached by the court, was:

---

100. 207 F. Supp. 856, 858 (D. Md. 1962).

101. This case had been in the district court once before, 171 F. Supp. 37 (1959), where the court held that an illegal tying arrangement did not exist. The circuit court, 286 F.2d 832 (1960), reversed and found an illegal tying arrangement to exist. They remanded for a computation of damages. Certiorari was denied, 366 U.S. 963 (1961), and the case went back to the district court only on the damages question.

102. The plaintiff claimed and the court found that he suffered a $12,000 loss in anticipated profits as a result of this refusal to deal.

103. 250 U.S. 300 (1919). The single trader rule as announced by the Supreme Court was:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases.'

Id. at 307. This rule was later interpreted by the Supreme Court to mean that if a seller merely announces a restrictive trade policy and then refuses to sell to those who decline to abide by that policy no antitrust violation has been committed. However, if the seller does more, if he engages in actions beyond the, "mere announcement of the policy . . . and he employs other means which affect adherence . . . ," he is violating the antitrust laws. United States v. Parke, Davis and Co., 362 U.S. 29, 44 (1960).

104. Klor's, Inc. v. Broadway Hale Stores, 359 U.S. 207 (1959).

105. Eastman Kodak v. Southern Photo Materials, 273 U.S. 359 (1927).

106. 324 F.2d 566 (4th Cir. 1963).

107. *Id.* at 573-75.

108. 15 U.S.C. § 15 (1970).

109. Osborn v. Sinclair Refining Co., 324 F.2d 566, 572 (4th Cir. 1963).

110. 15 U.S.C. § 15 (1970).

111. Osborn v. Sinclair Refining Co., 324 F.2d 566, 572 (4th Cir. 1963).

> There is no justification in antitrust law . . . for limiting recovery to losses sustained before the breach in business relations. Where the customer is cut off in a coercive attempt to further a forbidden arrangement for a 'fenced off market,' he is entitled to recover *all* damages issuing from that punitive action. To deny him this would eviscerate section 4[112] (emphasis added).

Because the district court's finding as to the damages stemming from the refusal to deal were not clearly erroneous the plaintiff was allowed to recover the $12,000 (trebled) in anticipated profits that he claimed to have lost in addition to the amount of the overcharge.[113]

It is important to note the court's language that "*all*" damages accruing from the violation are recoverable. This is a significant break with previous tie-in litigation. The district court, following tradition, had asserted that when the antitrust violation involved a tying arrangement the injury and therefore the damage recoverable was determined by the amount of the overcharge. The circuit court rejected this doctrine, at least in the situation where the plaintiff was forced out of business as a result of his refusal to comply with the tying arrangement even though some overcharge damage had been suffered. It would not take a fundamental leap of logic to extend the proposition set forth by the circuit court and allow the plaintiff involved in an illegal tying arrangement to recover "*all*" damages suffered, including the amount of the overcharge, as a result of the antitrust violation regardless of whether or not the plaintiff is actually forced out of business.[114]

This recovery of anticipated future profits for refusal to deal was announced one year later in the Ninth Circuit in *Lessig v. Tidewater Oil Company*.[115] The plaintiff claimed that his lease was cancelled because of his refusal to sell gasoline at the company's "suggested" retail price. In addition he declared that the defendant required Tidewater dealers to buy TBA from certain specified companies at higher than normal prices. Refusal to comply resulted in a threat by the defendant to cancel the offending dealer's lease. Two items of damage were sought: loss of reasonably anticipated future profits because of the illegal termination of his lease, and the amount of the overcharge that the plaintiff was forced to pay due to the existence of the tying arrangement.

The appellate court found that both the termination of the

112. *Id.* at 573.
113. The district court had determined the overcharge to be $325.
114. *See* note 120 and accompanying text *infra*.
115. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

lease and the tying arrangement violated the antitrust laws and that there was sufficient evidence to sustain both damage recoveries. The court, however, made one additional comment regarding the tying arrangement:

> Lessig did not contend that the alleged exclusive dealing and tying arrangements led to the cancellation of his lease; and we agree with Tidewater that there is little evidence that Lessig was damaged prior to the termination of his lease by the requirement that he purchase petroleum products exclusively from Tidewater.[116]

The clear implication of that statement is that if any damage *prior* to the termination of the lease *in addition to* the amount of the overcharge was sufficiently proven the court would not hesitate to allow the plaintiff to recover that additional damage. However, the Ninth Circuit has not acted in accordance with the implication contained in this language in all cases. When faced with an ordinary tie-in violation the court has limited recovery to the amount of the overcharge.[117]

It is significant that this liberalization of damages has occurred only in cases where the injured party has actually been driven out of business as a result of the tying arrangement. In not one case where the plaintiff was the operator of a going business was he allowed to recover more than the amount of the overcharge. There is no explanation for this relatively limited measure of damages.

The argument might be made that trebling the amount of the overcharge is sufficient to compensate the plaintiff for all of his losses. However, this argument misses the primary reason for the existence of Section 4 of the Clayton Act.[118] This trebel damage provision was designed to encourage private parties to bring suit[119] so as to help the government police antitrust violators. This provision was *not* meant to encourage the judiciary to develop only one measure of recovery and then treble it, thereby supplanting all other types of recovery for injuries suffered as a result of the violation.[120]

---

116. *Id.* at 471. The Court continued however, that the evidence was sufficient to show that Lessig was paying more than he should have for the TBA.

117. *See* note 86 *supra*.

118. 15 U.S.C. § 15 (1970).

119. It is for this reason that several courts have not allowed the plaintiff to recover additional punitive damages or interest. These courts have felt that allowing the plaintiff to treble his actual amount of damages provided the necessary incentive and takes care of these other two punitive aspects more than adequately.

Punitive Damages: Stanton v. Texas Co., 294 F.2d 344 (5th Cir. 1957); Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S.D.N.Y. 1936). *Logic.* Treble the amount of the actual damages carries its own symbol of punishment.

Interest: Locklin Radiant Color Co. v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); Eastern Fireproofing Co., Inc. v. U.S. Gypsum Co., 50 F.R.D. 140 (D. Arizona 1970).

120. One court stated the policy of the treble damage provision as

The logic of this position becomes abundantly clear when a re-examination is made of the types of damages held to be recoverable for other violations of the antitrust laws.[121] Since, as is stated,[122] none of the categories are mutually exclusive an injured party should be able to recover some, if not all, of these damages no matter what type of violation actually caused the injury. Certainly proving lost profits[123] or damage to good will[124] is no more difficult when the antitrust violation falls under Section 3[125] of the Clayton Act rather than Section 2(a).[126] If the policy[127] of Section 4[128] is not to be "eviscerated," as long as the fact of injury is present, the plaintiff litigating an illegal tie-in should be able to recover whatever damages he can prove with reasonable certainty[129] and not be limited merely to the amount of the overcharge.

C. *The Defense of Passing On*

Recently the courts have taken an oblique step in implementing this philosophy. For years, the primary defense of a corporation which was sued for an antitrust violation was that of passing on. If the defendant could prove that the plaintiff had passed on to a third party the extra cost of doing business that resulted from the antitrust violation, the plaintiff was denied all recovery. The first rejection of this theory came in 1918 in the case of *Southern*

---

follows:

> The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor compliments the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction.

Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957).

121. *See* notes 63-65 and accompanying text *supra*.
122. *See* note 66 and accompanying text *supra*.
123. *See* notes 148-57 and accompanying text *infra*.
124. The factors to be considered when determining damage to good-will as the result of an antitrust violation are:

> (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?
> (2) What is the reasonable prospect that this additional profit will continue into the future considering all circumstances existing and known as of the date of the valuation?

Standard Oil Co. v. Moore, 251 F.2d 188, 219 (9th Cir.), *cert. denied*, 356 U.S. 975 (1958).

125. 15 U.S.C. § 14 (1970).
126. 15 U.S.C. § 13a (1970). Robinson-Patman Price Discrimination Act.
127. *See* note 120 *supra*.
128. 15 U.S.C. § 15 (1970).
129. Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

Pacific Co. v. Darnell-Taener Lumber Co.[130] The case concerned excessive railroad freight charges. The defendants claimed that the plaintiffs had suffered no damage because the excessive costs were passed on to the consumer in the form of higher prices for lumber. Mr. Justice Holmes speaking for the Court stated that:

> [T]he general tendency of the law in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered loss. The plaintiffs suffered losses to the amount of the verdict when they paid [the overcharge]. The carrier ought not to be allowed to retain his illegal profit and the only one that can take it from him is the one that alone was within relation with him and from whom the carrier took the sum.[131]

Despite this strong position the rationale was never carried over into antitrust law and the doctrine retained an amazing amount of vitality.

It was not until 1968 in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*[132] that the doctrine was finally put to rest in antitrust litigation. The defendant was found to have violated Section 2 of the Sherman Act[133] by engaging in a policy of only leasing its machinery and refusing to sell the equipment outright to shoe manufacturing concerns. In attempting to avoid liability for damages, United stated that the increased cost of doing business accruing to Hanover from this illegal practice was passed on to the plaintiff's customers. The Court firmly rejected this defense and stated that the injured party was entitled to recover treble damages, (1) if he absorbs the loss, (2) if he maintains his own price but takes steps to increase his volume or decrease other costs, or (3) if he raises his prices.[134] Mr. Justice White speaking for the Court stated:

> As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high and his profits would be greater were his costs lower.[135]

In essence the Court stated that were the defense allowed, only the ultimate consumers who absorbed the overcharge would be able to bring suit. But since their interests in the litigation would amount to no more than several pairs of shoes no litigation would be likely to develop. As a result:

> Those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality

130. 245 U.S. 531 (1918).
131. *Id.* at 533-34.
132. 392 U.S. 481 (1968).
133. 15 U.S.C. § 2 (1970).
134. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1970).
135. *Id.* at 489.

> because no one would be able to bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized would be substantially reduced in effectiveness.[136]

The Court's decision is important in several respects. First, it prevents antitrust violators from escaping liability by asserting the artificial defense of passing on. Second, and more importantly the Court is allowing recovery despite the fact that the plaintiffs may not be technically bearing the loss. The policy stated in this decision is to increase the effectiveness of private antitrust litigation by, (a) allowing the plaintiff to recover whatever damages he can prove and, (b) by not inhibiting the injured person with strict rules concerning the amount and type of recovery.[137]

Four factors augur well for increased liberalization in the measure of damages a plaintiff involved in an illegal tie-in may recover. First, there appears to be no reason why the traditional measure of damages applied to other antitrust violations[138] are not equally applicable to Section 3[139] violations. Secondly, the small steps taken in *Osborn*[140] and *Lessig*[141] would indicate that the courts are beginning to realize that overcharge is only one element of compensable damages in tie-in cases. Thirdly, is the action by the Supreme Court in *Hanover Shoe*[142] and its stated policy of encouraging private enforcement suits to make them a vital element in antitrust litigation. This Supreme Court mandate should encourage courts to liberalize damage rules in tie-in litigation and allow the plaintiff to recover whatever damages he can prove. Finally, and perhaps most importantly, is the fact that no court has ever stated that other types of damages are not recoverable.[143] Coupled with the other three, this factor provides a powerful impetus for the courts to expand their heretofore limited measure of recovery in cases that involve tying arrangements.

D. *Measure of Recovery for Those Excluded from the Market as Result of the Tying Arrangement*

The most commonly alleged injury by this group of litigants

---

136. *Id.* at 494.
137. *Id.* at 493-94.
138. *See* notes 63-65 and accompanying text *supra.*
139. 15 U.S.C. § 14 (1970).
140. *See* note 99 and accompanying text *supra.*
141. *See* note 115 and accompanying text *supra.*
142. *See* note 132 and accompanying text *supra.*
143. In all the cases that have been discussed so far not one has indicated or even hinted that a plaintiff may not receive something other than overcharge.

as a result of an illegal tying arrangement is lost profits.[144] The courts have been quite lenient in determining what proof a plaintiff may use to demonstrate that his profits have been diminished.[145] In addition, consistent with the statement that several types of damage recoveries are allowable under Clayton Section 4,[146] injured plaintiffs have been able to recoup a variety of losses caused by the antitrust violation.[147]

Traditionally, lost profits as a result of antitrust violations has been measured in two different ways.[148] Both methods were developed in *Bigelow v. RKO Radio Pictures*.[149] The plaintiff, an independent theatre operator alleged that RKO was engaged in a conspiracy that prevented him from obtaining films for exhibition until other, preferred operators, had shown them in earlier more desirable runs. As a result, he contended his profits suffered a sharp loss.

The plaintiff sought recovery on two theories. He introduced evidence which tended to show that his net profits before the antitrust violation were higher than during the period when the antitrust violation was in existence. Therefore, under this theory the plaintiff was demanding the difference between the net profits before the violation and the net profits that were recorded during the violation.[150] In addition, the plaintiff also offered evidence which indicated that his net receipts were approximately $115,000 less during the period of the violation than those of a preferred exhibitor whose theatre was comparable in size but inferior in its location and physical appointments.[151] The Court held each class of evidence offered was sufficient to show lost profits but that the classes were not mutually exclusive. The plaintiff was allowed to recover his net loss in admission receipts.[152]

---

144. The Supreme Court in one case and several circuit courts have held that the damages recoverable under Section 4 of the Clayton Act are net rather than gross profits. *See* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Arthur Murray, Inc. v. Reserve Plan, Inc., 406 F.2d 1138 (8th Cir. 1969); Wolfe v. National Lead Co., 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); Peter v. Union Oil Co., 328 F. Supp. 998 (C.D. Cal. 1971); 2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845 (N.D. Ill. 1967); Siegfried v. Kansas City Star Co., 193 F. Supp. 427 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962); Chiplets, Inc. v. June Dairy Products Co., 114 F. Supp. 129 (D.C.N.J. 1953).

145. *See* notes 148-57 and accompanying text *infra*.

146. 15 U.S.C. § 15 (1970). *See* note 63-65 and accompanying text *supra*.

147. *See* note 158 and accompanying text *infra*.

148. *See* notes 150 and 151 and accompanying text *infra*.

149. 327 U.S. 251 (1946).

150. This theory of recovery has been categorized as the before and after test.

151. This theory of recovery has been categorized as the yardstick test.

152. The usual types of evidence offered by the plaintiff to support these claims are: (1) Business records by the plaintiff before the conspiracy arose; (2) Business records of comparative but unrestrained enter-

Recently, a number of courts[153] have employed a third measure of recovery called sales projection to determine lost profits. This method was employed by the court in *Karseal v. Richfield Oil Corp.*[154] which involved a Section 3[155] violation. To establish the amount of damages recoverable the plaintiff offered proof that its product Wax Seal sold 3 to 7 times better on the open market than did Mac's, the product which the defendant forced its stations to purchase. The plaintiff then offered evidence which demonstrated that Richfield bought 4,707 cases of Mac's polish during the years when the violation was in existence. Karseal claimed that the jury could infer that Wax Seal outsold Mac's 3 to 1. Thus, had plaintiff been allowed access to defendant's 3,000 stations approximately 19,000 cases of Wax Seal would have been sold at Richfield stations during the years in question. It also offered proof that during the period of the antitrust violation its profit on a case of Wax Seal was 57¢ per case.[156]

The court experienced no difficulty in allowing Karseal to prove lost profits with this rather unique approach. It commented that a plaintiff was not expected to prove loss stemming from an antitrust violation with mathematical certainty and it analogized:

> [W]e do not see much difference between the suggested formula as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering and the various other items of damage.[157]

Why this rather cavalier attitude toward proving damage should prevail when dealing with this second cateogry of injured plaintiffs as opposed to the first is a problem that the courts have never attempted to address, let alone answer.

That lost profits is not the only measure of damages that can or should be awarded by courts dealing with tie-in violations is amply demonstrated by *Advance Business Systems and Supply Co. v.*

---

prises during the particular period in question; (3) Expert opinion based on items (1) or (2). Flintkote Co. v. Lysfjord, 246 F.2d 368, 393 (9th Cir. 1957).

153. Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966); North Texas Producers Association v. Young, 308 F.2d 235 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080 (D. Md. 1969).

154. 271 F.2d 709 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960).

155. 15 U.S.C. § 14 (1970).

156. Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 714 (9th Cir. 1959).

157. *Id.* at 714.

SCM Corporation.[158] SCM had an involved series of tying arrangements which required that any person using their photocopying equipment also had to use SCM paper.[159] As a result plaintiff was unable to sell competing types of paper to those customers who had SCM equipment.

The plaintiff claimed four measures of damage: (1) the cost of maintaining a service department;[160] (2) the time spent by plaintiff's president in servicing and mollifying plaintiff's customers because of SCM's threats and other restrictive practices which could have been spent in other work profitable to the plaintiff; (3) loss of sales; (4) lost rentals on machines "cannibalized" to provide parts used in service to plaintiff's customers.[161] Items three and four were disallowed by the court because it found that neither SCM's service nor parts policy involved an illegal tying arrangement.[162]

On appeal the circuit court[163] affirmed the findings of the district court but in addition indicated that the cancellation clause contained in the service contract[164] constituted an illegal tying arrangement. Thus the plaintiff was able to recover for the specific sales it lost as a result of this cancellation clause.

The importance of this case does not lie in merely listing the damages that the plaintiff was able to recover but rather in demonstrating the court's attitude in allowing this diversified recovery. The appeals court did not engage in any long discussion attempting to confine certain types of damage recoveries to specific situations, but merely found that the award of the district court was not "clearly erroneous." If this attitude were to prevail throughout the entire area of tie-in violations, plaintiffs would be encouraged to bring more antitrust litigation, thus making private enforcement suits an even more effective means of controlling big business.

---

158. 287 F. Supp. 143 (W.D. Okla. 1968), *aff'd,* 415 F.2d 55 (1969), *cert. denied,* 397 U.S. 920 (1970).

159. The tying arrangements found to exist were:
(1) SCM tied the sale of its paper to its service agreement. In its agreement SCM undertook on the basis of a single annual charge, to provide an unlimited number of service calls during the duration of the agreement, to make regular inspections and to replace certain defective parts free of charge. However, if SCM found that its customers were using other than SCM paper it reserved the right to cancel the agreement at any time.
(2) SCM leased its Model 55 Copier on a copy service basis which meant there was a charge for each use of the machine and this charge included paper and toner which were supplied by SCM as needed. The Model 55 was eventually offered for sale without these restrictions but it was never leased on other than a copy service basis.

160. Since SCM refused to service those machines using competitors paper the plaintiff was forced, if he wanted to retain his customers who used SCM machines, to maintain a service department.

161. Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143, 158 (W.D. Okla. 1968).

162. *Id.* at 157 and 158.

163. 415 F.2d 55 (4th Cir. 1969).

164. *See* note 159 *supra.*

Finally, one other type of damage, lost investment, has been awarded by a court[165] to a corporation damaged as a result of an illegal tying arrangement. The essence of this type of recovery is out-of-pocket expense. In this case, plaintiff Wescoast, alleged that as a result of an illegal tying arrangement it was unable to complete construction of a cable television installation. The plaintiff claimed that the tying arrangement was designed not to make them buy the tied product but to keep them completely out of the cable television market. As a result of this arrangement, Wescoast was forced to sell out for far less than the business was worth.

In the suit for damages plaintiff introduced evidence which indicated its net investment in the business. Even though there was other evidence to show that the fair market value of the business was above this net investment figure the court deemed the measure of recovery to be the difference between the net investment of Wescoast and the sale price it had received from the defendant. The plaintiff did not make a strong argument that the measure of recovery should be the difference between the fair market value and the sale price. The court was not afforded the opportunity to comment on this aspect of the case since the defendant had, on appeal, contended that plaintiff's evidence was insufficient to sustain any recovery. It is an open question that, if the plaintiff had appealed on the grounds of an insufficient damage recovery, the court would have awarded more than mere out-of-pocket expense.

CONCLUSION

It is evident that a plaintiff involved in an antitrust suit under Section 4 of the Clayton Act[166] or Section 1 of the Sherman Act[167] must meet considerable court created obstacles in pursuing private enforcement litigation. On the one hand, the courts have liberalized the requirements necessary to prove an illegal tying arrangement[168] but they still seem to adhere to a strict set of standing rules.[169] Although espousing a policy to encourage private antitrust litigation,[170] the courts continue to severely limit the damages recoverable by plaintiffs involved in illegal tying arrangements. It

165. Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965), *cert. denied*, 382 U.S. 817 (1965).
166. 15 U.S.C. § 15 (1970).
167. 15 U.S.C. § 1 (1970).
168. *See* notes 13-15 and accompanying text *supra*.
169. *See* note 40 and accompanying text *supra*.
170. *See* note 120 and accompanying text *supra*.

is to be hoped that the courts will eventually resolve these discrepancies and unite to strengthen private enforcement litigation.

As was indicated throughout this article there appears to be no reason why plaintiffs who are actually involved in an illegal tie-in should be limited to a damage recovery measured solely by the amount of the overcharge. If the courts are to remain consistent with the types of damages awarded in other antitrust litigation,[171] the plaintiff should be allowed to recover whatever damages he can prove resulted from the illegal tying arrangement. The decisions in *Osborn*[172] and *Lessig*[173] evince a trend in this direction.

As for plaintiffs damaged by market exclusion, the courts have now adopted the attitude that the plaintiff can and will be allowed to recover whatever damages he can prove. The decision in *Advance Business*[174] should stand as a model for all courts dealing with this area of tie-in litigation. With the continued expansion of big business the liberal attitude displayed by this case provides encouragement for the continued and expanding vitality of private antitrust enforcement as a method of curbing excesses of the business community.

GREGORY J. BLASI

171. *See* notes 63-65 and accompanying text *supra.*

172. Osborn v. Sinclair Refining Corp., 207 F. Supp. 856 (D. Md. 1962), *rev'd,* 324 F.2d 566 (4th Cir. 1963). *See* note 99 and accompanying text *supra.*

173. Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964). *See* note 115 and accompanying text *supra.*

174. 287 F. Supp. 143 (W.D. Okla. 1968), *aff'd,* 415 F.2d 55 (1969). *See* note 158 and accompanying text *supra.*